

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

AUGUSTA ROBINSON

on behalf of KEVIN STREETS, a minor,

Complainant,

v.

Docket No. PAR-140-07

EEOC No. 17J-2006-02448

CHARLESTON TOWN CENTER COMPANY, LP,

Respondent.

FINAL DECISION

A consolidated public hearing, in the above-captioned matter, was convened on December 12th, 13th, and 14th, 2007 in Kanawha County, at the West Virginia Human Rights Commission's Office Hearing Room, at Room 108A, 1321 Plaza East, Charleston, West Virginia, before Robert B. Wilson, Administrative Law Judge.

The Complainants, Augusta Robinson, as well as, the previously minor child Kevin Streets, appeared in person and by Commission's Counsel, Paul R. Sheridan, Esq, Deputy Attorney General for the Civil Rights Division of the West Virginia Attorney General's Office, and Heather L. Laick, Esq., Assistant Attorney General. The Respondent, Charleston Town Center Company, LP, appeared in person by its representative, Thomas A. Bird, General Manager, and by Counsel, Edward Tiffey, Esq. The record was held open until January 28, 2008 to admit the Affidavit of Officer Hunt. The parties submitted proposed findings of fact and conclusions of law, memoranda of law in support thereof through April

7, 2008 and response briefs through April 18, 2008.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of Counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the Administrative Law Judge and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or necessary to a proper decision. To the extent that the testimony of the various witnesses is not in accord with the findings stated herein, it is not credited.

I.

STATEMENT OF THE CASE

May 22, 2006, Steven M. Bumpus and Kevin Streets, who were both male African American teenagers, went to the Charleston Town Center Mall. They met up with another friend and entered the Mall. Almost immediately upon entering, Mall security guards, contracted to provide security services by Respondent, began following the three African-American teenagers. This made Mr. Bumpus and Mr. Streets very uncomfortable, to the point where Mr. Bumpus called his mother regarding the treatment. Later, they met up with other

African American friends at the food court. Although some of the kids had obviously just eaten, a Mall security guard confronted the teens regarding being in the food court while they were not eating. The security guard summoned police officers who confronted the teens in a very rude and threatening fashion, ultimately resulting in a group of four of the teens leaving the area and continuing to wander about the Mall. They stopped by a store to window shop and were told that they could not stop and had to keep moving. The Mall security guards eventually approached the teens on the first floor and with several police officers escorted them out of the Lee Street side entrance, no explanation was given them as to why they were being escorted out. The teens then went to the Cinema but did not go in as the movies had already started. They went to Chili's and had dinner. When they went to exit the restaurant, a large group of African American males were engaged in a confrontation with Mall security guards, who told the group that they were calling the police and they had better leave. The group of four who were exiting Chili's had called parents to pick them up. While they waited the Mall security guards told them they had to leave. Mr. Bumpus ignored them and did not respond. Mr. Streets tried to explain that they were waiting to be picked up and that they could not leave. The group that had been causing the trouble all left when the police began to arrive leaving Mr. Bumpus, Mr. Streets and Larry Martin. One of the police officers got in the face of one of the teens and was attempting to provoke him with taunts and insults. They were arrested by police for obstructing and trespassing, and taken to the police station in the paddy wagon.

II.

PARTIES' CONTENTIONS

Complainant's contend that on May 22, 2006, Steven M. Bumpus and Kevin Streets, who were both African American males, went to the Charleston Town Center Mall. The met up with another friend and entered the Mall. From the moment they entered Complainants contend the Respondent's agents followed them based upon racial profiling. Later the three individuals went to the food court where they met with other African American friends. While there, they were confronted by security guards who ordered the African Americans to leave the food court. After leaving the food court they wandered around the Mall for a period of time and were again approached by Mall security guards and asked to leave the Mall just before 9:00 pm. Mr. Bumpus and Mr. Streets went to the Cinema for a short while but did not see any movies that were about to start and therefore went back to the Mall to eat at Chili's with Larry Martin. After exiting Chili's and while waiting for parents to pick them up, the group was near another group of African American youth who had a confrontation with Mall security officers and were ordered to leave Mall property and the Police were called. When Mr. Bumpus and Mr. Streets tried to explain that they had to wait for a ride, they became upset that they were treated by Mall security and by police in a hostile manner and ordering them to leave. They were arrested for trespassing when a large contingent of police cars and paddy wagon responded to the scene and the other group had fled the area. Complainant's contend that the African American young men were singled out for profiling because of their race.

Respondent denies that Mr. Bumpus and Mr. Streets were denied the use and enjoyment of the Charleston Town Center on the basis of race. Respondent contends that Mr. Bumpus and Mr. Street were asked to leave the Mall property due to their personal conduct, which violated the Code of Conduct for the Mall and ultimately constituted trespass. Respondent further contends that Mr. Bumpus and Mr. Streets did not attempt to avail themselves of the accommodations, advantages, privileges or services of the Charleston Town Center in the first instance.

III.

SUMMARY OF DECISION

The Respondent, through its agents, indirectly denied and withheld advantages and privileges of the use of the Mall, a place of public accommodation, from Mr. Bumpus and Mr. Streets, by making them feel unwelcome and harassing them on the basis of their race, African-American. Upon entering the Mall, in a group of three, while the Mall's rule prohibits groups of four or more individuals, the group was immediately followed and watched by Mall security guards. The testimony of Respondent's witnesses that this did not occur is simply not credible. Further, upon engaging in a gathering in the food court area in a group larger than four individuals and not having food and drink, Mr. Bumpus and Mr. Streets were in violation of the Mall Code of Conduct. The Mall Security however did not explain that the groups of four were not allowed and instead asked them to leave because they did not have food and drink. This was not the case apparently as the food wrappers were

at the table where the group was congregating. When the police officers were summoned by Lt. Hager, of Mall security, he explained he needed assistance in removing African American teens from the food court. One of the youths was clearly eating and drinking and refused to leave. Lt. Hager did not explain that he could remain because he had food and drink but rather allowed the police to bully Mr. Harris into leaving the food court even though he had complied with the requirement that he have food and drink. The Complainants with Mr. Martin and Mr. Medley, who they met at the food court, exited the food court when police officers arrived and told them to leave.

Again, when the group of four had left the food court, they were told to "keep moving" when they stopped at a store front to window shop. The Mall security guard did not mention the group of four rule. When Mr. Bumpus and Mr. Streets were escorted from the Mall around nine, the closing time for the Mall store hours, no explanation was given as to why they were being asked to leave, while other patrons continued to pass through the Mall without being confronted in such a manner. Respondent's agent, testified that they would normally explain the Mall Code of Conduct Rule when breaking up groups of teens in groups larger than four, but that no such attempt was made by him in these instances. The explanation given and the demeanor of the witness in testimony, indicates that he did not do so because he didn't want any trouble, although that is why the explanation is routinely given. This reaction seems to be based upon the race of Mr. Bumpus and Mr. Streets, and that such explanations would some how be ineffectual in their case.

Finally, Mr. Bumpus and Mr. Streets, along with Mr. Martin, were arrested for

trespassing while attempting to leave a restaurant adjacent to the Mall at the insistence of the Mall security guard, Lt. Hager, who appears to have associated them with another group of African-Americans with whom they had engaged in an altercation with outside the Mall entrance. Although this may have been a reasonable misapprehension in the turmoil, it was clearly based upon the fact that they were African American, male youths and were stereotyped on that basis when told to leave by the security guards, and despite any attempts to reason with the police who responded. Again, in the arrest process, the one police officer, was clearly out of control, acting in an irresponsible fashion. The Respondent contends they are not liable for the actions of the police. This is not the case as the Mall security guards clearly directed the actions of the police when responding to Mall calls, and use them to enforce Mall Code of Conduct violations, with the threat of trespass criminal violations upon the say so of the Mall security guards. Specifically, in this instance, Lt. Hager identified Mr. Bumpus and Mr. Streets as trespassers to be removed from Mall property by the police. When they refused to leave when the police told them to, because they were specifically instructed by Ms. Bumpus to stay where they were to be picked up and because they had been instructed not to go where the police were telling them to go because it was unsafe in those areas, Mr. Bumpus and Mr. Streets were arrested by the police with Mr. Martin for criminal trespass. While the actions of Mall security guards are generally salutary in effect, and the enforcement of a Mall Code of Conduct is laudable and inherently reasonable, the fashion in which it is enforced should not depend upon the race of the individuals against whom it is applied.

IV.

FINDINGS OF FACT

1. Complainant, Augusta Robinson is the grandmother and apparent guardian of Kevin Street, who was a minor child , and a seventeen year old junior in high school, on May 22, 2006. Tr. Vol. I, page 102; and Tr. Vol. II pages 79 and 84.

2. On April 22, 2006, Cynthia Bumpus, Steven Bumpus's mother, dropped off Steven Bumpus and Kevin Streets at the Court Street entrance to the Mall around 7:00 pm. Kevin Streets had been staying with the Bumpus's for the week during the spring break for the highschool they attended at the time. Tr. Vol. I, pages 225 and 226.

3. The routine was that the kids would go to the Mall, go to the movies and then eat and Ms. Bumpus would pick them up afterward. The rules were that they were to be outside the Court Street entrance when she arrived and that they were not to go across the street to the Transit Mall or down the street because it's trouble and they have no business there. Tr. Vol. I, pages 226 and 227.

4. Mr. Streets and Mr. Bumpus met their friend, Larry Martin, who had been dropped off by his father, at the Mall entrance and entered the Mall. As they walked through the Mall, the three were not causing any commotion or disruption. Nevertheless, the three African American male youth noticed that several Mall security guards appeared to be following them and watching them. This made them uncomfortable and Mr. Bumpus called his mother to tell her what was happening. Ms. Bumpus said your not doing anything wrong just go on about your business and don't worry about it. Tr. Vol. I, pages 22-24, 28, 29, 105,

106 and 231; Vol. II, p.47.

5. After about forty some minutes of wandering around the Mall, the three teens went up to the food court on the third floor where they saw other African-American friends from Capital High. After about ten minutes Mall security guards approached and told them they would have to leave the food court because they did not have food or drinks. Tr. Vol. I, pages 22-24, 73-75 and 107-108; Vol. II page 76.

6. The group of eight African American teens were sitting around different tables and some of the group had clearly been eating food from Sub-Way. The group refused to leave the food court when instructed and called Lt. Hager a rent-a-cop. At that point Lt. Hager, a Mall security guard, went down stairs in the food court and approached two police officers for assistance in getting the group of African American youth to leave the food court. Lt. Hager did not tell the group that they were being loud or give them the option of getting something to eat in ordering them to exit the food court. When police officer Ross came upstairs, he approached Keith Harris who was seated with his Coke and sandwich in front of him and Mr. Harris refused to get up and leave. Officer Ross slammed some chairs around and threatened to taser the youths if they did not leave. Mr. Bumpus and Mr. Streets left with Larry Martin and Lamar Medley, whom they had met at the food court, at that point. Tr. Vol. I, pages 109-112, 131, 139; Vol. III, pages 16-22, 58-60, 66 and 68-75.

7. Lt. Hager testified he approached the youth alone at the food court because there was a loud commotion. His testimony is not credited for several reasons. First there is the contradictory explanations provided by Respondent. In their answers to interrogatories they

state that he was called by the Taste of Crete regarding a commotion. His testimony was significantly different at hearing. His testimony that he approached the group at the food court alone is contradicted by his testimony that he had made a general call on radio regarding the food court group. Should the group of youth been loud, Lt. Hager did not mention that fact to the group or ask that they quite down. Racial animus appears in Lt. Hager based upon the fact that he instructed police to remove not only those of the group who had no food but also Mr. Harris, who is African American, when he clearly had the food and drink at the time the officers approached him. Lt Hager did nothing to instruct the officers that Mr. Harris had complied with the Mall rule for which he was ostensibly being asked to leave the food court. Commission's Exhibit No. 8, page 4 at ¶ 7.

8. After being evicted from the food court, the Complainants with Mr. Martin and Mr. Medley, continued to window shop in the Mall. Soon thereafter, the group was confronted by a Mall security guard on the second level, who told them they could not pause to window shop, but rather had to "constantly keep moving". Tr. Vol I pages 36 and 112.

9. Then, just before 9:00 p.m., Mall security confronted the Complainants again, this time insisting that they leave the Town Center Mall. Lieutenant Hager again resorted to using the Charleston Police. Respondent claims that the Mall was closed at this point in time, but this is contradicted by the credible testimony of the Complainants, and there is other evidence which supports the Complainants' version of this fact.

10. The youths were escorted out of the Lee Street exit of the Mall by officers, who offered no explanation to them as to why they were being evicted. They were escorted out

through the parking garage. The Mall security officer Lt. Hager did not treat them in a courteous or professional manner. Tr. Vol. I, pages 37, 81 and 113.

11. Lieutenant Hager testified that he later encountered the Complainants, and that on this occasion "they were in a group of about seven." Lieutenant Hager also testified that this alleged group of seven people was the "same group" he had encountered in the food court, yet other than Steven Bumpus and Kevin Streets, Lt. Hager could not describe any of the seven, other than that they were African American. Lieutenant Hager's Daily Activity Report (DAR) refers to this group as "another large group of kids,"(emphasis supplied), strongly suggesting that Lt. Hager was paying very little attention to any details. The testimony of the two Complainants that they were with Larry and Lamar is credible. Tr. Vol. III, pages. 86-88; Commission's Exhibit No. 17.

12. The Complainants questioned Lt. Hager and the police officer why they were being evicted; however, the credible evidence is that they acquiesced and were not disruptive. Tr. Vol. I, page 141; Commission's Exhibit No.17, page 1.

13. Lieutenant Hager claims that when he was evicting Steven Bumpus and Kevin Streets, shortly after closing, "one of the mothers got on the phone with me because the gentleman just handed me the phone and said, 'My mom wants to talk to you.'" Lieutenant Hager testified that he believed it was Bumpus' mother, that she asked him why he was harassing her child, and he said, "Ma'am, I'm not harassing anybody." Lieutenant Hager was later more certain about it, claiming that he specifically recalled that the woman on the telephone identified herself as "Mrs. Bumpus." Lieutenant Hager never made any notation

of her name. Tr. Vol. III, pages 30 and 89; Commission's Exhibit 17.

14. Lieutenant Hager made no notations of any such call from Ms. Bumpus on his DAR. He did write in his Statement of September 20, 2006, five months after the incident, that "at 21:35 pm received a call from one of the boy's mother asking why I was harassing her two boy's I told her they were yelling and playing around in mall. And the mall was closed at this time. And they was refusing to leave." Commission's Exhibit No. 17, page 3.

15. The documentary evidence clearly establishes that the events cannot have occurred as Lt. Hager claims. There were no calls between Steven Bumpus and his mother at 9:35 p.m. (which is 21:35 in military time). Hager could conceivably have been off on his time. However, if this were the case, it would also significantly undermine Lt. Hager's claims. The one to two minute call at 9:00 p.m. was made at the very instant that the stores in the Mall were closing (which was not after closing time at the Mall). If this was the call in which Lt. Hager claims he talked to Ms. Bumpus while the boys were being escorted out of the Mall, then it would mean the boys had been ordered to leave much earlier than Lt. Hager claims, and prior to closing. Hager's claim was that he asked the boys to leave at 9:18 p.m., that they refused, that he "called line car to assist," that Officer Coleman arrived, that "the group was mouthing myself and officer Coleman," and that the call then occurred while the boys were being escorted out. Besides, the one to two minutes length of the 9:00 call is not near enough time for Steven to talk to his mother, hand the phone to Lt. Hager, for Hager to talk to Ms. Bumpus, for him to hand the phone back to Steven and for him to finish the

call. The first call between Steven and Cynthia after 9:00 p.m. was at 10:55 p.m., over an hour after the Mall closed and moments before the arrests were made. Officer Coleman testified that he had been called earlier in the evening to escort an unruly group from the Mall about that time but that Complainants were around but weren't part of that group. Officer Coleman denied escorting Mr. Bumpus and Mr. Streets from the Mall at this time. Tr. Vol. II, pages 25-27; Commission's Exhibits Nos. 17 (page 3), 30 and 31.

16. The evidence clearly establishes that the Complainants were ordered out of the Mall before 9:00 p.m. on April 22, 2006. Regarding the call from Steven to Ms. Bumpus which was made precisely at 9:00 p.m., Cynthia Bumpus recalled that her son told her "they were escorting out the mall, that he mentioned Officer Coleman, and that he talked about the movies." Steven recalls that he called his mother from the Cinema, after they had been escorted out of the Mall and before they went to Chili's. He recalls that he told his mother "we were escorted out of the mall and that we went to the movies and that everything was playing so we, we were gonna – decided to go out to eat at Chili's. Either way, Lt. Hager's efforts to evict the boys was prior to 9:00 p.m. " Tr. Vol. I, pages 39, 234 and 235; Commission's Exhibits Nos. 30 and 31.

17. As they were being evicted from the Mall, Kevin Streets made a phone call to Carol Johnson Cyrus, his friend's aunt. Ms. Cyrus worked for the Town Center Mall on several occasions, and she currently works for Network Parking at the Mall on a seasonal basis. Ms. Cyrus recalled that Kevin told her that Mall Security was "bothering him," and that "they asked him to leave the Mall and he wasn't doing anything." Ms. Johnson testified

that she asked to speak to one of the officers, but he would not talk to her. Tr. Vol. I, pages 31-34, 43, 44, 46, 115 and 116.

18. Ms. Cyrus testified that this incident was not the first time she had heard complaints about African American males being harassed by Town Center Mall security, and as it turned out, she subsequently observed similar harassment. Ms. Johnson Cyrus told Kevin she would contact security. Tr. Vol. II, pages 34-36.

19. After Kevin's call, Ms. Cyrus called the Mall and asked to speak to security. The person who answered the phone for Mall security told Ms. Cyrus that "security doesn't just bother African Americans, they also get on Goths" (the white people that wear black clothing). Ms. Cyrus testified that she was surprised by this statement. Tr. Vol. II, page 37.

20. It is possible that the notation Lt. Hager made in his Statement of September 20, 2006, about a 21:35 (9:35 p.m.) telephone call he "received ... from one of the boy's mother asking why I was harassing her two boys" was actually the call from Ms. Cyrus. Commission's Exhibit No.17, page 3.

21. Ms. Cyrus testified that she made a subsequent call that evening to Tom Bird, the General Manager of the Town Center Mall, and left him a message. Mr. Bird called her back within a few days. However, before Mr. Bird called her back, she witnessed another incident involving Town Center Mall security guards hassling a young black man. Tom Bird eventually returned Ms. Johnson Cyrus's call, and they had a conversation about the three incidents. Mr. Bird told her about an incident the evening before when he "had to disperse five young ladies" at the Mall. He told her "it just wasn't a black issue." Mr. Bird

acknowledged that the security guards she talked to should not have said what they did. Tr. Vol. II, pages 38-41.

22. The Complainants walked from the Town Center Mall Lee Street exit to the movie theater at Park Place, but did not find a movie they wanted to see, so they decided to go to Chili's and eat. The four teens, Steven, Kevin, Larry and Lamar, went to Chili's, where they ate and watched a ball game, staying for over an hour. Tr. Vol. I, pages. 38-40, 116 and 117; Tr. Vol. II. page 150.

23. At approximately 10:55 p.m., the four teens exited Chili's. As he exited Chili's and walked to the railing along the wall just outside of Chili's, Steven called his mother, to have her pick him up in front of Chili's. The Bumpus telephone records reflect that this one to two minute call occurred at 10:55 p.m. Cynthia Bumpus recalls receiving this telephone call, and recalls her son telling her they needed a ride home. Tr. Vol. I, pages 40, 44, 117 and 236; Commission's Exhibits Nos. 30 and 31.

24. Shortly thereafter, Lamar left to be picked up, leaving the other three teens waiting by the railing for Cynthia Bumpus. Tr. Vol. I, page 47.

25. Steven Bumpus testified that as he was leaving Chili's, there was another confrontation going on with security guards and other "African American males." He witnessed "rude things," being said back and forth. Kevin confirmed that "both sides" contributed to this confrontation. Tr. Vol. I, pages 40, 43 and 118.

26. Respondent claims that sometime after 10:00 p.m., Lt. Hager got a call from the manager at Chili's regarding a disturbance. He responded and found approximately fifteen

black males, including Bumpus. Respondent claims Hager asked them to leave, but they “mouthed off.” Hager then called the police. Lt. Hager admitted that he couldn’t say whether Complainants said anything like calling him a rent-a-cop or threatening to whip his butt, because it just came from out of the group standing there. Hager also stated that although Complainant’s were just standing in the group of eight that remained when the police arrived, they were “you know, guilty by association we have them all leave...” “We don’t just say, ‘Well you can stay, you have to go.’” Tr. Vol. III, pages 119 and 128; Commission’s Exhibit No. 8, page 5.

27. Lieutenant Hager’s Daily Activity Report contains an entry which indicates that at 10:50 p.m. “about 15-20 black males standing and playing around in front of Chili’s.” He writes that they were the “same group” from the food court earlier. He writes that he called for line car. Hager states: “3 subjects were threatening security.”

28. The Metro operations records reflect that the first police officers pulled up just as Steven was calling his mother for a ride. The records also reflect that the call to Metro was made ten minutes before that, while Steven and Kevin were still in Chili’s. Clearly, the Complainants were not the cause of the call to Metro, nor the earlier call from the manager at Chilli’s to Lt. Hager. Commission’s Exhibit No.34.

29. At 10:45:50 precisely, Mall security calls Metro Emergency Operations Center, and reports “a large group of black males on Court Street side of the Mall.” The report states that “they have had problems with these subjects earlier today.” The call requests “help remove them.” At 10:49, Charleston Police Department Patrolmen Ross and Midkiff (Car

107) are dispatched to the Mall. Commission's Exhibit No. 34, pages 1 and 3.

30. At 10:54:43, Charleston Police Officers Lee Ross and Shawn Midkiff (Car 107) radio they have arrived at the Mall.

31. The Metro Operations records reflect that at 10:58 p.m., three additional Charleston Police Department cars were dispatched: Car 108 with Raymond Coleman, Car 104 with Gregory Stover, and Car DS18A with Christopher St. Clair. In addition, at 10:59 p.m., Car 101 and Car T1 (a prisoner transport van) are dispatched. Commission's Exhibit No. 34, page 3.

32. When the sirens of the arriving police cars could be heard, the other boys ran off. Tr. Vol. I, pages 118 and 119.

33. According to Patrolman Ross's police report, in the following 14 minutes (between his arrival at 10:54:43 p.m. and his departure at 11:09 p.m.) the following happened: "Carl Herber (sic) pointed to the subjects. I noticed that the juveniles were several individuals that had been told multiple times to leave the Mall (by security and police officers). I spoke with the subjects. I told the subjects to leave . . . They refused. I asked several more times. The subjects began to become irate. . . I asked Metro to send more units and I placed the three under arrest for disturbing." Commission's Exhibit No. 32.

34. The plain clothes officer was hostile and belligerent toward the boys, and Steven Bumpus and Kevin Streets perceived that he was trying to provoke them, particularly Larry Martin. Larry Martin's testimony confirmed this. Steven Bumpus testified credibly that he successfully encouraged his friend to stay calm and not give in to the provocation.

Tr. Vol. I, pages 51, 119 and 120; Tr. Vol. II, page 155.

35. Kevin Streets testified that this spot was the same place where he had been picked up many times before. Cynthia Bumpus testified that she had prohibited Steven from going to the transit mall. Tr. Vol. I, pages 122 and 227.

36. Kevin Streets recalled that they were told to leave and go wait at the transit mall, but they refused. He said, "we didn't want to be over there in the dark where meanness and stuff sit there and hand out right there in that little alleyway, we don't want to be part of that. We want to be where peoples are around us, where everybody always stands and we're gonna stand here and wait for our ride. And we just didn't understand why did we have to move, what were we doing wrong." Tr. Vol. I, page 122.

37. Kevin Streets readily admitted that he "had words" with Officer Ross outside of Chili's. He testified that he was near tears he was so upset. Kevin Streets was astounded by the way the boys were being treated, and it made him very angry. Tr. Vol. I, pages 120, 121, 142 and 152.

38. At 10:59 p.m., Patrolman Raymond Coleman arrived in Car 108. At 10:59, p.m. Patrolman Lloyd Brown arrives in the prisoner transport van, and at 10:59 p.m., Sergeant Christopher St. Clair arrives in Car DS18A. Commission's Exhibit No. 34, page 3.

39. At 10:59 p.m., Steven called his mother again. She recalled that it was reported to her that there was a policeman there. She told Steven she was on her way. Tr. Vol. I, page 236.

40. At 11:01 p.m., Patrolman James Hunt arrives in Car 3690. Commission's

Exhibit No. 34.

41. Between 10:58 and 11:09, Ross arrested all three juveniles. Witnesses to this included Ken Brooks and Ronald Harris.

42. The police officers arrested the three. Steven Bumpus testified that they were searched and handcuffed and his wallet and cell phone were confiscated. When the police officers moved to arrest the boys, they did not resist the arrest. Just as his phone was being confiscated, Steven's mother called back, but he did not get to talk to her. Tr. Vol. I, pp. 52, 53, 97, 98 and 122.

43. When Cynthia Bumpus called Steven back at 11:01, a policeman answered his telephone. He told Ms. Bumpus that "the kids had been in the mall running and they were told to eat or leave and they would not comply so they were trespassing." She told the officer she was on her way. Tr. Vol. I, pages 236 and 237.

44. At 11:09 p.m., Patrolmen Ross and Midkiff (Car 107), Patrolman Raymond Coleman (Car 108), and Patrolman Lloyd Brown left in the prisoner transport van with three juveniles. Commission's Exhibit No. 34.

45. The Metro records reflect that Coleman arrived on the scene at 10:59 p.m. By the time Coleman arrived, the situation was "in hand" and "under control." He testified that "there were things being said that other kids were there and that other kids had gone, the ones that was supposedly been causing the problems, that they had already left." (Tr. Vol. II, p. 112). This testimony supports the Complainants' claim that they were trying to explain the circumstances to the security officers and the other police officers, who would not listen. Tr.

Vol. II, pages 104 and 112; Commission's Exhibit No. 34 .

46. Other than being in a place where Town Center Mall security did not want them to be, Officer Coleman did not see these three boys violate any laws. Officer Coleman testified that there were other people in that area at the time. These other people were people who were leaving the Mall. Town Center Mall security showed no interest in evicting these people from the sidewalk. Tr. Vol. II, pages 115-119.

47. Coleman testified that he recognized Kevin Streets and Steven Bumpus at the scene. Streets and Bumpus were telling Ross and Midkiff that "there were other kids who were there," and "the kids that was causing the disturbance . . . had already left." Coleman testified that he recalled Kevin Streets being "pretty upset"; but that "it wasn't where he was making, causing a big loud scene." He was not being violent or disruptive. Coleman recalled Kevin Streets stating "that they were being harassed by Mall security." It was clear to Coleman that Kevin Streets was upset because he believed he was being discriminated against. Tr. Vol. II, pages 102, 103 and 113-115.

48. Coleman recalled that Officer Ross had spoken to Town Center Mall security upon arrival. If Midkiff or Ross made any effort to inquire about the other boys who had been there and who had been causing the disturbance, Coleman did not hear it. Coleman could not recall whether or not he personally spoke with the Complainants. Coleman recalled that Officers Ross and Midkiff made the decision to make arrests. Tr. Vol. II, pages 102, 111 and 120.

49. Clearly the use of the public sidewalk, regardless of its ownership by the

Respondent, to use as an exit from a public restaurant and to wait to be picked up by a parent, is an attempt to avail oneself of a public accommodation. The use of the facility by the public is expected and its use was denied to Mr. Streets and Mr. Bumpus on the basis of their race. The fact of the matter is that Lt. Hager associated Mr. Bumpus and Mr. Streets with the group which was causing the disturbance on the basis of their being African American and in the same vicinity when he arrived on the scene. Should Mr. Bumpus and Mr. Streets have been another race , gender or age, Lt. Hager would not have any reason to order their removal from Mall property. As Mr. Bumpus and Mr. Streets were not part of that group, which was causing the disturbance, it is an act of racial discrimination to have prevented their lawful use of the Respondent's facilities of public accommodation.

50. Lt. Hager's willingness to explain violations to people violating Mall rules to allow them to comply with those rules in most instances is in contrast to his treatment of the African American teenagers based upon the testimony herein. His demeanor during the Public Hearing was indicative of racial animus. He described the teens leaving the food court as "... stood up, you know, with force ...". He described the group repeatedly through his testimony as "mouthing him". When it got down to it, this seems to have consisted as saying nothing more than we aren't doing anything, why are you bothering us and in the most extreme someone in a group saying he was a rent a cop. Lt. Hager repeatedly seemed to associate the Complainants with other African American teens in a group, when other than physical proximity in location the group in question was not in fact associated with the others. One example is the testimony of Police Officer Coleman that Mr. Bumpus and Mr.

Streets were not part of the group that was being rude to Lt. Hager and Officer Coleman when they were being escorted out of the Mall around closing time. Another example is the fact that Mr. Bumpus and Mr. Robinson were not part of the group causing the problems at the Mall entrance later that evening until after the police had been summoned. They were justified to wait for a ride following their meal at Chili's.

51. Mr. Streets' training for his position in loss prevention at Penny's included a film on not engaging in racial profiling, but rather concentrating on suspicious behaviors. His training included treating even those suspected of/or guilty of infractions such as shoplifting in a courteous fashion with respect. Mr. Street's and Mr. Bumpus's experiences on April 22, 2006 were in contrast to this proper treatment, when both were immediately watched and followed by Mall security officers when they were not engaged in any sort of misbehavior. Lt. Hager's interactions with them throughout the evening were discourteous and often unwarranted. There has been no training of the contractors providing security at the Mall regarding prevention of racial profiling.

52. Although Police Officer Peoples denies that Mall Security officers have ever acted based upon race in their activities, Police Officer Coleman indicated that when he receives calls to escort from the Mall they are commonly African Americans. Police Officer Brown testified credibly that it was 100% of the time minorities or blacks being evicted or escorted from the Mall on the calls he participated in over the years. Vol II, pages 62, 63, 69, 70 130 and 131.

53. Mr. Streets has suffered humiliation, embarrassment, emotional distress and

loss of personal dignity as a result of his treatment by Respondent's agents. Being followed when not loud or disruptive bothered him. In his words, "I felt like I was already being like I'm a troublemaker and I'm just coming here to cause trouble or do something bad, I'm bad." In describing the fact that they were ordered to leave the front of Chili's after eating there, when they weren't doing anything wrong, he stated, "I couldn't take it; I couldn't believe it was going on anymore and I was getting real mad." Tr. Vol. I, pages 106, 120 and 121.

V.

DISCUSSION

The West Virginia Human Rights Act forbids discrimination against persons by those operating a place of public accommodation. West Virginia Code §5-11-9(6) makes it unlawful; "For any person being the owner, lessee, proprietor, manager, agent or employee of any place of public accommodation to . . . (A) Refuse, withhold from or deny to any individual because of his or her race, . . . either directly or indirectly, any of the accommodations, advantages, facilities, privileges or services of the place of accommodations; . . .

In order to make a prima facie case of discrimination in a place of public accommodation, the complainant must prove the following elements:

(A) that the complainant is a member of a protected class;

(B) that the complainant attempted to avail himself of the "accommodations, advantages, privileges or services" of a place of public accommodation; and,

(C) that the “accommodations, advantages, privileges or services” were withheld, denied or refused to the complainant. K-Mart Corporation v. Human Rights Commission, 383 S.E.2d 277, syllabus pt. 1 (W.Va. 1989).

The complainant’s prima facie case can be rebutted if the respondent presents a nondiscriminatory reason for the action in question sufficient to overcome the inference of discriminatory intent. K-Mart Corporation v. Human Rights Commission, 383 S.E.2d 277, syllabus pt. 2 (W.Va. 1989). The complainant may still prevail if it can be shown that the reason given by the respondent is merely pretext for a discriminatory motive. K-Mart Corporation v. Human Rights Commission, 383 S.E.2d 277, syllabus pt. 3 (W.Va. 1989).

A discrimination case may be proven under a disparate treatment theory which requires that the Complainant prove a discriminatory intent on the part of the Respondent. The Complainant may prove discriminatory intent by a three step inferential proof formula first articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); and adopted by the West Virginia Supreme Court in Shepardstown Volunteer Fire Dept. v. West Virginia Human Rights Comm’n, 172 W. Va. 627, 309 S.E.2d 342 (1983). Under this formula, the Complainant must first establish a prima facie case of discrimination; the Respondent has the opportunity to articulate a legitimate nondiscriminatory reason for its action; and finally the Complainant must show that the reason proffered by the Respondent was not the true reason for the decision, but rather pretext for discrimination.

The term “pretext” has been held to mean an ostensible reason or motive assigned as a color or cover for the real reason; false appearance or pretense. West Virginia Institute of

Tech. v. West Virginia Human Rights Comm'n, 181 W. Va. 525, 383 S.E.2d 490 (1989).

A proffered reason is pretext if it is not the true reason for the decision. Conaway v. Eastern Associated Coal Corp., *supra*. Pretext may be shown through direct or circumstantial evidence of falsity or discrimination; and where pretext is shown, discrimination may be inferred, Barefoot v. Sundale Nursing Home, 193 W. Va. 475, 457 S.E.2d 152 (1995), although it need not, as a matter of law, be found. St. Mary's Honor Society v. Hicks, 509 U.S. 502 (1993).

There is also the "mixed motive" analysis under which a Complainant may proceed to show pretext, as established by the United States Supreme Court in PriceWaterhouse v. Hopkins, 490 U.S. 228 (1989), and recognized by the West Virginia Supreme Court in West Virginia Institute of Tech., *supra*. "Mixed motive" applies where the Respondent articulates a legitimate nondiscriminatory reason for its decision which is not pretextual, but where a discriminatory motive plays a part in the adverse decision. Under the mixed motive analysis, the Complainant need only show that the Complainant's protected class played some part in the decision, and the employer can avoid liability only by proving that it would have made the same decision even if the Complainant's protected class had not been considered. Barefoot, *supra*, 193 W. Va. at 485, 487, 457 S.E.2d at 162 n.16, 164 n.18.

The Respondent contends that the Complainants cannot establish a prima facie case of public accommodation discrimination because they neither attempted to avail themselves of the accommodations, advantages, privileges or services of the Respondent in the first instance; nor, did the Respondent withhold, deny or refuse the same to Complainants. Even

if the Complainants had made out a prima facie case of discrimination, Respondent contends, Complainants were treated in accordance with their behavior which violated the Mall's Code of Conduct. Further, it is Respondent's contention Complainants have not demonstrated any nexus between their treatment and a racially discriminatory motivation on the part of the Respondent's agents. These arguments are without merit in light of the preponderance of the evidence adduced at Public Hearing.

Respondent is not engaged in the business of making retail sales. Thus, Respondent's argument that Complainants did not attempt to avail themselves of the accommodations of the Respondent because they did not intend to make any such retail purchases at the Mall is without merit. Respondent is engaged in the business of owning and operating a commons area for the use of the public to facilitate shopping and other activities at the Mall. These activities include among others, dining, banking and postal services, in addition to the very usual practice of engaging in public social interaction associated from time immemorial with the public market. The public is implicitly invited to this commons area as the public's presence facilitates the impulse of such attendees to make purchases from the Mall's tenants, either at that time or perhaps in the future. Even more clearly, when a patron of a restaurant exits such establishment onto what would be a public sidewalk to all appearances (were it not happened to be owned by Respondent); Respondent clearly expects that its sidewalk will be utilized by the public. It is clearly expected that Complainants, who had been eating at Chili's, would exit onto the sidewalk; and, that they would have occasion to wait there for transportation upon exiting. Having entered the Mall; albeit it for the sole purpose of social

activity, Complainants have a right to its enjoyment under the same terms as that of white patrons. The same is even more so the case when Complainants exited a public restaurant and attempted to wait for their transportation home at night.

The undersigned, having concluded that Complainants attempted to avail themselves of the accommodations, advantages, privileges or services of the Respondent, must next determine whether, the same were withheld denied or refused to Complainants. One of the advantages and privileges of being in a public market is that of feeling welcome to be there and to be free of undue attention by security police forces. Mr. Streets testified credibly as to his proper training in loss prevention, that one bases such security scrutiny upon the actions of individuals, which is suspicious in nature, rather than upon other attributes, as such other attributes do nothing to help identify those engaged in, or who would engage in illegal or wrongful conduct. That training also expects Mr. Streets to be courteous and respectful, even to those who are caught engaging in illegal activities by him. To be followed and watched incessantly by Mall security, when three black youths entered the Mall and were not doing anything wrong is an act of intimidation that would be un-welcoming and a deterrent to the utilization of the Mall by young African-American males subjected to that treatment. That is a denial of the advantages and privileges of a public accommodation. It is quite apparent that the Mall's agents, the contract security officers, are not trained to avoid racial profiling and stereotyping in dealing with their duties. As Mr. Bumpus testified, being followed and watched when not loud or disruptive made him uncomfortable. As Mr. Streets testified, "I felt like I was already being . . . like I'm a troublemaker and I'm just coming here

to cause trouble or do something bad like, I'm bad."

There is absolutely no argument remotely to made regarding the withholding, denial and refusal of the accommodations, advantages, privileges or services of the Respondent in terms of the use of the their sidewalk outside of Chili's restaurant. Complainants had just spent their money at a public restaurant attached to the Mall. The use of the sidewalk outside is an accommodation to the public for the very purposes for which Complainants attempted to avail themselves. A citizen of this country has every right and expectation that they would be and should be permitted to await their ride outside the establishment they had just exited. Respondent attempts to distance themselves from the fact that Complainants were arrested outside the restaurant because the actions were those of police and not Respondent. This is patently absurd. The Complainants were not breaking any laws by standing where they were standing, other than and until Respondent, by its agent, Lt. Hager, specifically identified Complainants and Mr. Martin as trespassers upon their private property to be removed therefrom by the police.

The Complainant has established a prima facie case of racially discriminatory denial of public accommodation by Respondent. Complainants are African-American. Complainants attempted to use the common areas of the Mall and were harassed and intimidated throughout the evening of April 22, 2006; ultimately, being arrested for trespassing outside Chili's restaurant when they awaited a ride following the purchase of a meal there.

Respondent offers as its non discriminatory reason for its adverse treatment of

Complainants, that the treatment of Complainants was based upon their own misbehavior and violations of the Respondent's Code of Conduct. Complainants contend on the other hand that they were harassed the entire night of April 22, 2006 based upon their race. Although the Respondent's explanations are plausible and have a certain easy and comforting appeal, there are too many troubling pieces of evidence which tilt the preponderance of evidence to an inescapable conclusion that Complainants were treated differently from white patrons of the Mall; both in the much harsher application of the Code and the utilization of the Charleston Police Department to intimidate Complainants and others of their race upon the direction of the Respondent's agents.

First, the undersigned cannot discern any misbehavior or violation of the Mall Code of Conduct to explain the fact that the Complainants were subjected to being watched and followed by Mall security officers upon entering the Mall that night. Clearly they were being followed and watched for no other reason than their race. The testimony that they were followed by several security officers is not inconsistent with the fact that various security officers were watching them at different times. Respondent's explanation that security officers are never together because they have different patrol areas does not discount the clear testimony of Complainants that they were being watched and followed. Clearly two patrol areas abut one another and there were other occasions, when by Respondent's witnesses' own testimony, they would be together in a group. Mr. Bumpus's call to his mother seems inconsistent with teenage behavior unless it was because he was upset about something that was occurring.

Respondent's main witness in this case indicates that on the one hand he will typically explain the Mall Code of Conduct to people who are breaching it and suggest how they might comply with the rule to alleviate the problem. In stark contrast the same treatment of Complainants and others of their race seems to be completely lacking. At the food court, Lt. Hager never mentioned that the group was too loud, if they quieted down they would be free to stay. Lt. Hager instead told them they had to leave because they didn't have any food. He did not say if you get something to eat you are free to remain. In fact he ran for the police and instructed them to remove the group without regard to whether or not they were eating. In fact Lt. Hager seems to resort to obtaining police intervention as a first resort when he deals with African American teenagers with instruction to have them leave; in contrast to his treatment of most people which consists of explaining the problem and telling the individuals involved what they need to do to comply with the rules.

These explanations were never given to Complainants, who repeatedly asked why they were being treated in this fashion by Mall security when they could not discern any misbehavior or wrongdoing on their part. These protestations and questions were instead clearly regarded by Lt Hager as "mouthing" him. There is no rule which prohibits window shopping, yet Complainants were approached and told they had to keep moving. The same thing occurred when Complainants were escorted out of the Mall. They were asking why are we being asked to leave now, when everyone else is being left alone to leave on their own? No explanation; again a call for the Charleston Police Department to remove them from the premises while other members of the public were not. There is no question but that the Mall

security officers systematically harassed Complainants the entire night of April 22, 2006. Respondent really objects to Complainants "running the Mall", which in reality means nothing more than "hanging out at the Mall" (which is apparently alright as long as you're an off duty white Mall security officer). When police officers told them to leave the food court, Complainants left. This despite the distinct impression they were under that there was no good reason they should have to move given that the food court was by no means busy and that they were in fact being harassed. When told to leave, the Complainants left the Mall (prior to closing), despite the fact that only African Americans were being asked to leave while white patrons continued to walk in the Mall. Complainants had the unmitigated gall to mouth Lt. Hager, by asking why this was being done. The undersigned found Lt. Hager's testimony that he explained why they were being asked to leave less credible than Carol Cyrus Johnson's testimony that he refused to talk to her.

Finally, there is the incident outside of Chili's restaurant, which resulted in the arrest of Complainants for trespass. Lt. Hager associated Complainants with the group that was causing trouble that night outside the Mall entrance simply because they were African American teenagers. Should Complainants have been white, Lt. Hager would not have instructed Charleston City Police to remove them from the sidewalk just because they were outside of Chili's restaurant. Only because Complainants had questioned the treatment they were receiving from Mall security and him specifically earlier in the evening, Lt. Hager pointed them out to Charleston City Police and directed that they be told to go somewhere which placed them in danger, when they were entitled to stay right where they were. That

insistence resulted in their arrest, which Respondent now claims is the result of Complainant's own behavior, completely disowning their responsibility in the events.

The events of that night clearly upset Complainants, notwithstanding one of those arrested laughed while inside the paddy wagon. The Complainants are entitled to incidental damages with respect to their claims against Respondent. Pearlman Realty Agency v. West Virginia Human Rights Commission, 161 W. Va. 1, 239 S.E.2d 145 (1977); Bishop Coal Co. V. Salyers, 181 W. Va. 71, 380 S.E.2d 238 (1989). Bishop Coal provides that the \$2,500 cap on incidental damages may be adjusted from time to time to conform with the Consumer Price Index. Bishop Coal, 380 S.E.2d at 247. In keeping with this language, the Commission has periodically raised the cap on incidental damages. Currently the cap for emotional distress is \$5,000.00 for each claim. The Complainant is entitled to such damages from the Respondent in no less than this amount. The Commission takes the position that in virtually all cases where discrimination has occurred, the Complainant has suffered injury well in excess of the constitutionally capped amount awarded by the Commission for such injuries. Accordingly, Respondent should be charged with the maximum available award.

CONCLUSIONS OF LAW

1. The Complainant's then minor ward, Kevin Streets, is an individual aggrieved by an unlawful discriminatory practice, and his guardian is a proper Complainant under the West Virginia Human Rights Act, W. Va. Code §5-11-10.

2. The Respondent, Charleston Town Center Mall, LP, is a "person" and a "place

of public accommodation” as those terms are defined under W. Va. Code §5-11-1 et seq., and is subject to the provisions of the West Virginia Human Rights Act.

3. The West Virginia Human Rights Commission has proper jurisdiction over the parties and the subject matter of this section pursuant to W. Va. Code §5-11-9 et seq.

4. The Complainant has established a prima facie case of racial discrimination denying the advantages and privileges of the Respondent’s place of public accommodation. The Respondent’s alternative explanations for its actions have been proven by the preponderance of the evidence to be pretext for racial discrimination.

5. The Complainant was subjected to a severe incident of racial harassment by a agents of Respondent.

VII.

RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, it is hereby
ORDERED:

1. The above named respondent shall cease and desist from engaging in unlawful discriminatory practices.

2. Within 31 days of the receipt of the undersigned’s order, the Respondent shall pay the reasonable costs totaling \$1,358.50 incurred in the prosecution of this matter, or one half of the amount set forth more fully in the Itemization of Expenses, attached to

Commission's Proposed Findings of Fact and Conclusions of Law and Memorandum of law.

3. Within 31 days of receipt of the undersigned's order, the Respondent shall pay the Complainant incidental damages in the amount of \$5,000.00 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of Respondent's unlawful discrimination, plus statutory interest of ten percent.

4. Within 31 days of receipt of the undersigned's order, the Respondent shall establish a plan to implement training of its contracted mall security personnel to refrain from engaging in racial profiling and to include sensitivity training regarding individuals belonging to classes protected under the West Virginia Human Rights Act.

5. In the event of failure of the Respondent to perform any of the obligations hereinbefore set forth, Complainant is directed to immediately so advise the West Virginia Human Rights Commission, Compliance Director, 1321 Plaza East, Room 108-A, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so **ORDERED**.

Entered this _____ day of May, 2008.

See original
order in record
for signature & date

WV HUMAN RIGHTS COMMISSION

ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE
1321 Plaza East, Room 108-A
Charleston, WV 25301